Supreme Court, U.S.
FILED

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No. 96-

In The

Supreme Court of the United States

October Term, 1996

FRANCISCO MADRIL, JR.,

Petitioner,

v.

ERNESTINE B. GALLEGO,

Respondent,

Petition For Writ Of Certiorari

To The Supreme Court Of Arizona

PETITION FOR WRIT OF CERTIORARI

FRANCISCO MADRIL, JR.
6025 SOUTH HOLLY DRIVE
TUCSON, AZ 85706-4630
(520) 889-8086, 889-6414
PRO SE PETITIONER

50 pp

QUESTIONS PRESENTED

Promissory note and Deed of Trust recorded 7-17-86 were co-owned by Frank Madril, Sr. *OR* Francisco Madril, Jr. after 12-7-84 and before 7-11-86 originating from a 9-15-81 loan paying Plaintiff's community debts.

November 9, 1989 Plaintiff filed divorce D-077466, *ONE* respondent and *NO* allegations of *invalid* documents.

August of 1990, Frank, Sr. died, Francisco, Jr. became sole owner of promissory notes and documents.

September of 1990 Plaintiff Amended divorce D-077466, four years after 7-17-86, seeking an interest in Francisco Jr.'s residence, Desert Diamond Corp. and alleges the 7-17-86 Deed of Trust was invalid and executed to avoid payment of judgment by dba *MADRIL'S TAX AND ACCOUNTING*, and dba *MADRIL REALTY AND TRUST*, No. 225622, Judge Lawrence H. Fleischman gave judgment, but *NOT* against *MADRIL REALTY AND TRUST*. D-077466 dismissed me and I kept all interest in my residence, Desert Diamond Corp., Deeds of Trust and promissory notes. Prior to September of 1990 I was not given a written notice or warning that any documents or promissory notes or Deeds of Trust were *invalid*.

D-077466 issues divorce decree October of 1991.

February of 1992 Francisco, Jr. files a Trustee Sale

QUESTIONS PRESENTED - Continued

to sell residence, obtain cash and pay attorney fees for the defense and dismissal of Plaintiff's false allegations.

April of 1992 Plaintiff files No. 286066 in Superior Court pursuant to A.R.S. Sec. 12-1831 et seq. that Promissory Note is void, Deed of Trust is invalid because indebtedness upon which it is based is invalid, includes many co-defendant*S*, all of which were dismissed or defaulted leaving *ONE defendant, Francisco Madril, Jr.*

Trial Court gives judgment 3-8-95 to Plaintiff against Defendant*S* (*S*?, one defendant remained), finds document*s* (12-7-84 note and Deed of Trust omitted?) in question was to frustrate creditor*S* (*S*?, there is only one creditor, No. 225622?) of *Madril family enterpriseS* (*S*?, *Madril's Tax and Accounting* is one enterprise).

Francisco Madril, Jr. appeals to Court of Appeals. Court of Appeals affirms Trial Court on December 26, 1995 and finds that He raises *numerous errors*, none of which merit reversal, (1)"... *any evidence* to support the judgment of the trial court, it must be affirmed"., Plaintiff testified that Carlos *told her* during the 1982 tax season that he had repaid the 1981 loan with money earned during that time frame from their tax and accounting business, ...she saw checks made out to Frank, Sr. in

QUESTIONS PRESENTED - Continued

amounts"[a]nywhere from $50 to $300, $400.", Court retrieved the divorce file and "leaf[ed]" through it. The trial court asked plaintiff's counsel if he had ordered a recent civil arrest warrant contained in the divorce file, and counsel replied that he had. The court also used financial affidavit filed in the divorce action to confirm plaintiff's testimony concerning income earned during 1989. There is no indication that the trial court took judicial notice of the divorce file or was requested to do so, and the court's limited reference to it, even **if erroneous**, is not grounds for reversal. Even if the court's reference to the financial affidavit **was improper**, that was not the only evidence of the Madril business earning in *1989*.(?) Plaintiff testified about those earnings, (3) Defendant also contends that the trial court *erred* in admitting plaintiff's testimony about statements allegedly made by Carlota and Frank, Sr., because they were *inadmissible hearsay* and ... evidence relating to the Madril family corporation and to Carlos and plaintiff's divorce was irrelevant and therefore *improperly admitted ...*, ... we affirm regardless of ***any alleged error*** in admitting other evidence. ...plaintiff should not have been awarded fees because she conspired with Carlos to create and record fraudulent instruments in violation of

QUESTIONS PRESENTED - Continued

A.R.S. Sec. 39-161, We reject that contention..., ... it was not raised in the trial court, we need not consider it.

Francisco Madril, Jr. appeals to Supreme Court of Arizona, Petition for Review denied June 16, 1996. Francisco Madril, Jr. files Motion for Permission to Request Reconsideration From the Supreme Court, Motion denied July 16, 1996 by the Supreme Court of Arizona. The questions presented here are:

1. In accord with the Fifth and Fourteenth Amendments; did the Trial Court, over the *objections*; *standing objections*; and *judicially approved continuing objections* of admitting evidence not introduced by counsel, abuse its' discretion and improperly took *judicial notice* of *divorce file D-077466*, *exhibits*, and *judicially noticed* the "*facts*" of an alleged *conspiracy* in the *divorce file* when the trial Court in the minutes of its' civil decision quoted the alleged *dissolution conspiracy* theory "... to frustrate creditor*S* of the *Madril family enterpriseS*..."? But, in truth, the *Madril family enterpriseS* from the *divorce* file are comprised of co-respondents *Madril Tax and Accounting and Madril Realty*, Desert Diamond Corp., La Posada Investment Company and Madril Associates with none of these companies being co-defendants in the

QUESTIONS PRESENTED - Continued

civil trial at hand? *Judicially noticed* Plaintiff's *1989 divorce file*, Carlos Madril respondent with no co-respondents? *Judicially noticed* 1990 amended divorce file with *Madril family enterpriseS* as co-respondents in the name of *Madril Tax and Accounting and Madril Realty*, La Posada Investment Co., Desert Diamond Corp., Madril Associates, *Frank Madril, Jr.*, Santiago Madril, Richard Madril, Delia N. Madril, Lilliian Molina, Eleazar Leon, Marie A. Cardenas and Estate of Frank Madril, Sr.?

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PETITION FOR WRIT OF CERTIORARI

Francisco Madril, Jr. respectfully prays that a writ of certiorari issue to review the minute entry judgment of the Trial Court, the Memorandum Decision of the Court of Appeals of the State of Arizona, the Petition for Review of the Supreme Court of the State of Arizona and *Motion for Permission to Request Reconsideration From the Supreme Court of Arizona* entered in this proceedings on July 16, 1996, in order to resolve the conflict of the Fifth and Fourteenth Amendments when trial courts over counsel's judicially approved continuing objection of admitting evidence not introduced by counsel, abused its' discretion and improperly took constructive, effective and actual judicial notice of the plaintiff's Superior Court dissolution file, exhibits, and *judicially noticed* the "facts" of the conspiracy of *Madril family enterpriseS* from the dissolution file when the Trial Court quoted the same divorce conspiracy theory "... to frustrate creditor*S of the Madril family enterprises...*" in the minutes of its civil decision. The Trial Court gives a civil judgment against defendants (from the divorce file?) when only one defendant was at trial in the civil action and refers to creditors (from the divorce file?) in the civil judgment when there is only one creditor, Cause No.225622. The

Trial Court refers to the 1989 financial affidavit in the divorce file as evidence to retroactively make a reasonable inference of the 1982 income and uses this unoffered, tainted evidence as the basis for paying note 1 in 1982. Tainted evidence hints of tainted judiciary conduct as in the conviction and ethics charges of Pima County Judges William L. Scholl, Michael J. Brown and Lawrence H. Fleischman. Fleischman litigated Cause No. 225622, dba Madril Tax & Accounting & Realty Trust (Madril enterprises). The attorney for Cause No. 225622 was Gregory D'Antonio who was barred from the Arizona State Bar for drug related charges.

OPINIONS BELOW

The opinion of the Arizona Appeals Court was entered on December 26, 1995, and the Arizona Supreme Court denied the Petition for Review on June 19, 1996, and denied the Motion for Permission to Request Reconsideration from the Supreme Court on July 16, 1996, which gives rise to this petition. Cause Nos. 2 CA-CV 95-0188, Petition and Motion are reproduced in the Appendix.

JURISDICTION

On July 17, 1996, the Arizona Supreme Court denied Francisco Madril, Jr.'s timely filed Motion for Permission to Request Reconsideration from the Supreme Court on July 16, 1996. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the filing of the Motion, July 16, 1996.

Jurisdiction of the Court to review this matter is lodged in this Court by the terms of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall...be deprived of life, liberty, or property, without due process of law...

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows::

Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

In September, 1981, plaintiff and her husband Carlos Madril borrowed money from Carlos' father, Frank, Sr. and did not pay it back. Three promissory notes were signed to affirm debt and defendant asserts that the 12-4-84 note defeats both theories offered by Plaintiff and used by the Court. In October, 1989, Plaintiff filed dissolution petition D-077466, with no co-respondent and no reference to any *invalid lien or note*.

August, 1990, after Frank, Sr. died, Francisco, Jr., inherited the notes and was in mourning.

September, 1990, plaintiff files an amended divorce pleading alleging invalid liens (fraud), names Madril family enterprises as co-respondents, aka "Madril Realty, Madril Tax and Accounting, Madril Associates, Desert Diamond Corporation, La Posada Investment Company and names as additional co-respondents FRANK MADRIL, JR, Richard Madril, Santiago Madril, Estate of Frank Madril, Sr., Delia N. Madril, Lillian Molina, Marie A. Cardenas (daughter of plaintiff) and Eleazar Leon.

Francisco Madril, Jr. has to hire an attorney to prevent plaintiff assertions that she has a community interest in (1) Francisco Jr.'s residence, (2) Desert Diamond Corp. and (3) deny that the note and lien are invalid.

No one contests ownership in Madril Realty or Madril Tax and Accounting because Ernestine was part owner of these companies. No one contests ownership of La Posada Investment Company because it does not exist. Dismissal was granted after depositions, discovery of evidence and the divorce court finds no evidence of community assets held by Francisco Jr., Santiago Madril, Desert Diamond Corp. or Richard Madril. The dissolution Trial Court abused his discretion with co-respondents, but more importantly allowed the development of a theory incorrectly associating the Madril family with the various Madril enterprises. When any person reviews any of the three divorce files it is apparent that each file is time consuming and gives the reader a different period and version of the divorce.

The evidence of the debt was a $5,700 18% Note secured by a Deed of Trust dated 9-15-81 which was signed by Carlos Madril to his parents, not notarized or recorded and due 11-15 without any year typed. Carlos produced a $3,000 cashier's check from his father dated 9-15-81 and a truth in lending statement as proof that his father lent him $5,700. Plaintiff alleges that the $5,700 note and Deed of Trust was paid partially on 11-15-81 and in full in 1982.

Secondly, the plaintiff alleges that she and Carlos signed a $5,857.16 5% note and Deed of Trust on 12-7-84 to Carlos' parents, due 12-7-89 and created for the purpose of frustrating Mark Rogers. Plaintiff alleges that the $5,857.16 note and Deed of Trust was the same 9-15-81 note allegedly paid in 1982. Defendant denies that neither the 9-15-81 or the 12-7-84 note was paid and declares that it is illogical for Plaintiff to allege that the 12-7-84 Note and Deed of Trust was created two years after the Note was paid in 1982. It is as illogical for Plaintiff to allege the 12-7-84 Note and Deed of Trust were created to frustrate Mark Rogers when complaint was not in existence on 12-7-84 and Plaintiff testified receiving the complaint 12-26-84, about three weeks after the 12-7-84 Note and Deed of Trust were created. Defendant affirms that the 12-7-84; 5% Note and Deed of Trust were created to re-negotiate the 18% interest rate to 5% and refused by his father.

Furthermore the debt is evidenced by a $5,857.16 18% note and Deed of Trust due 9-15-91, payable to Frank Sr. and Jr. and recorded 7-17-86 which plaintiff alleges was created on 7-11-86 in a scheme (Madril family enterprises) to defraud Mark Rogers. Court asks Plaintiff if a homestead exemption was on the residence and

Plaintiff answers "yes". Defendant declares the homestead exemption was already protecting the residence from the creditor prior to 12-7-84 as evidenced by the fact that the creditor had not attempted to take the residence from Plaintiff. The scheme theory is illogical in that it does not protect the residence, but the homestead exemption is logical.

Plaintiff testifies that Frank Sr. was paid in cash, but does know exact date in contrast to Court's assertion that the Note was paid in 1982. Plaintiff testifies that release of lien was prepared in October, 1989, that Frank Sr. was paid in full on May 19, 1987 and recorded 10-10-89. This statement contradicts the Court's assertion that the Note was paid in 1982 and before 7-11-86 by asserting that the 7-11-86 Note was not paid in full until 1987. Plaintiff also testifies that in October of 1988 she gave Frank Sr. a money order of $1,500. This statement is nonsensical in that Plaintiff had previously asserted that Frank Sr. was paid in cash, is illogical in that Frank Sr. was paid in 1982 and that the alleged 1988 payment asserts Defendant's position that the Note was not paid May 17, 1987 and was never paid. The evidence the Plaintiff did present as proof of payment was a disputed and questionable deed of release which was notarized

illegally by Plaintiff's convicted felon nephew.

During the trial plaintiff's attorney tried numerous times to have information of plaintiff's previous divorce case introduced as evidence, but defendant's attorney objected and had a standing objection. Plaintiff attorney's attempts to have the evidence admitted got the Trial Court's curiosity raised to the point that the Trial Court asked for and obtained the plaintiff's divorce file under the court's judicial authority. During the remainder of the trial the Trial Court perused, read, and leafed through the file at will, he carried the file around like a reference book all through the trial in full view of all parties. The Trial Court initiated questions to the plaintiff's counsel about documents filed in the divorce proceedings, and questioned the plaintiff extensively on the affidavits in the divorce file over the standing objection of Jr.'s attorney.

The Trial Court demonstrated its' intent to use the divorce file and divorce exhibits to resolve the case by making numerous statements throughout the proceedings:

> THE COURT: Yes. He's going to have to come back. I want the divorce file and any exhibits that there may still be there next Tuesday morning. And I guess I've got a couple things on my mind, so I'm going to ask a few questions and then we'll break until Tuesday.
>
> Was the subject of how the money that was loaned to you in 19-- in September of 1981, how

it was to be repaid, the subject of a dispute between you and Ernestine? Did she chaff at the interest rate? (2RT 85/1-11)

Again the Trial Court made statements that he insistently wanted to use the divorce file and the exhibits to resolve the case:

THE COURT: That's all I have for now. We'll break until 9:30 Tuesday. I want the divorce file. (2RT 89/19-21)

During the proceedings the Trial Court advises the parties that he was in possession of the divorce file and was following the proceedings, and reviewing the divorce file and exhibits at the same time by stating:

A I believe that's possibly the first time I saw it.
Q Which would have been some time after 1989?
THE COURT: I've got the file right here, counsel. (3RT 26/20-24)

Next the Trial Court ordered the proceedings stopped, so he could examine the divorce file and the exhibits. Next the Trial Court refers to the civil arrest warrant in the divorce file, which was never introduced as evidence by either party. The Trial Court then questions Plaintiff's counsel, if he had ordered the civil arrest warrant in the divorce file which relates to a time period after the divorce in October of 1991.

THE COURT: I'm going to take a break for about 10 minutes. I'm trying to leaf through the divorce

> file. The last thing is an order for a civil arrest warrant, less than two weeks ago. Did counsel order that?
> MR. STIRTON: Yes. (3RT 26/20-24)

The Trial Court was not only examining the divorce file and exhibits, but examining post divorce proceedings and exhibits in the divorce file as well. The post-divorce exhibit were not introduced by counsel as evidence due to the fact that they did not exist until two weeks prior to the trial date, but the Trial Court took judicial notice of the exhibits as evidence without having counsel introduce the evidence or stipulate.

Finally the Trial Court asks questions directly from the unintroduced affidavits of the divorce file's pleading which only represent a notice to the parties and are not evidence per se. Again, the Trial Court directly refers to the exhibit in the divorce file, judicially noticing the unoffered evidence of the financial affidavit of 1989 real estate commissions, tax and accounting income and uses this irrelevant evidence as circumstantial evidence and that 1982 real estate commissions, tax and accounting income and could be retroactively calculated by inference to 1989 unverified income and form a basis to decide that sufficient income was generated in 1982 to justify the payment of the Note and Deed of Trust 1982 as is evident

when the Trial Court asks questions of the witness.

THE COURT: Let me ask a couple questions. Miss Gallego, in the divorce file one of the first pleading filed was your estimate of your financial affidavit information. Let me show you what's here. You recognize whose writing that is?
THE WITNESS: That's mine.
THE COURT: This seems to indicate real estate commissions in I assume three transactions in 1989 of $5,500 and $5,527?
THE WITNESS: Yes.
THE COURT: And tax and accounting income from February through October 10th 1989 altogether 50,561?
THE WITNESS: Yes.
THE COURT: Those figures?
THE WITNESS: That's what this is right here. That's how we arrived at our child support and spousal maintenance figures.
THE COURT: What was your job in the going business?
THE WITNESS: I was the office manager. I ran the office, collected the money.
THE COURT: Bookkeeping and accounting service as well as a tax service?
THE WITNESS: Yes.
THE COURT: Why aren't there better records of income and disbursements?
THE WITNESS: Well, in '88 and "89 we did not have a checking account.
THE COURT: Why not?
THE WITNESS: Because of the Mark Rogers lawsuit we couldn't have anything in our name, no real estate, no savings nor checking, no nothing.
THE COURT: How about earlier '81 and '82?

THE WITNESS: We did have a Madril Tax and Accounting checkbook.
THE COURT: Again, where are the records that would indicate what was received and paid out to support all this evidence that I am hearing?
THE WITNESS: Mr. Madril, Carlos Madril has those records.
THE COURT: That's all.

Even though the divorce file and exhibits were never offered as evidence in the present case or presented for the Trial Court's judicial notice, the Trial Court took actual and affective judicial notice of the divorce court's civil arrest warrant, pleading, financial affidavits, and various other exhibits by usage in the minute entry of March, 1995, when the court states "...it is also clear that loan had been repaid in full well before the Deed of Trust dated July 17, 1986..." The statistical attempt by the Court to calculate the gross income of Carlos Madril can not use a single year as a sample, but must include a minimum of three to five years to average out the high and low gross income years. Assuming the gross income was statistically correct as an average income, the net income could not be calculated because the Court did not admit the data of operating expenses as evidence and the average gross income is not meaningful. The Trial Court's actions confirmed the subtle judicial notice of the use of

divorce file and exhibits by using them in the questioning of witnesses and commenting on their presence in this trial.

It must be noted that Carlos advised the Trial Court that he did not have a lawyer in the divorce, which meant Carlos did not have legal assistance in objecting to any evidentiary problem in the divorce proceedings.

2The final indication that the Trial Court took actual judicial notice of the divorce court's facts was when the Trial Court states "...the purpose for the executions of the various documents in question was to frustrate creditors of the Madril family enterprises...", but the alleged conspiracy theory was never proposed in trial, only in the plaintiff's divorce proceedings which the Trial Court took actual and effective judicial notice of the conspiracy theory facts.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict involving the interpretation of actual and effective judicial notice, Arizona Courts have held if the Trial Court states they are taking judicial notice, then the Trial Court can take judicial notice of the proceedings of the previous

court, but not the facts. Here the Trial Court never stated that judicial notice was being taken, but the Trial Court's actions indicate otherwise. Judicial notice of the proceedings and the refutable facts were overly taken. The Arizona Appeals Court held that judicial notice must be stated and taken as contrasted to the Trial Court remaining silent and in actuality taking judicial notice.

In accord with the Fifth and Fourteenth Amendments, was the conduct of the Trial Court sufficiently biased thus depriving Defendant of his equal protection of the law and due process of law by many unilateral judicial notices of unoffered factual evidence and judicially noticing the plaintiff's previous divorce file, exhibits, and theories and using the unoffered evidence as admitted and relevant evidence to form a basis for two parts of the court's minute entry "...loan had been repaid in full well before the Deed of Trust dated July 17, 1986..." and "...frustrate creditors of the Madril family enterprises..." without judicially noticing "facts" of defendant?

Since the Trial Court did not sustain defendant attorney's standing objection of the judicial notice of the divorce file and its' exhibits, then the court admitted unoffered evidence which becomes irrelevant evidence and

can not be a basis for a court's minute entry. Although the Trial Court could take judicial notice of procedural facts contained in the record of another Superior court action. *State v. Lynch*, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (App. 1977). The court cannot take facts, opinions, and irrelevant evidence into judicial notice. The Arizona courts have held "that the filing of a spousal affidavit with the clerk of the court in Maricopa County has no evidentiary value..." in *Kells v. Kells* 183 Ariz. Adv. Rep. 21 (1995). In Kells, the court took judicial notice of the affidavit, but the appeals court disagreed and noted that

> "the court could judicially notice only the procedural fact that the affidavit had been filed, not the truth of its assertions." *See Matter of Ronwin*, 139 Ariz. 576, 581, n.4, 680 P.2d 107, 112, n.4 cert. denied, 464 U.S. 977 (1983) ("We take notice that the cases exist, that allegations are made, etc. We cannot and do not take notice of the truth or falsity of specific allegations except as established by final judgment."); *State v. Lynch*, 115 Ariz. 19, 222 562 P.2d 1386, 1389 (App. 1977) proper to take judicial notice of procedural facts reflected in record, but not truth of testimony); Morris K. Udall et al., *Arizona Practice:Law of Evidence* §152 (3d ed. 1991) *Kells*, 183 Ariz. Adv. Rep. 21, 22 (1995).

The Trial Court used the Madril family enterprise conspiracy theory as fact in its' minute entry as well as "...loan had been repaid in full well before the Deed of

Trust dated July 17, 1986..." as justification for its' award. The Trial Court took actual judicial notice of the divorce trial "fact" that the petitioner was part of a demonstrably questionable conspiracy and took actual judicial notice of the divorce trial "facts" from the unverified 1989 financial affidavit and calculated sufficient 1982 income to prove that the loan was repaid in 1982..

The general rule is that the trial court will not travel outside the record of a case before it in order to notice proceedings in another case, even between same parties and in the same court, unless such proceedings are put in evidence, since decision of cause must depend upon evidence introduced. *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, certiorari denied 98 S.Ct. 744, 434 U.S 1020, 54 L.Ed.2.D 768, on remand 445 F.Supp. 1368. Here the Trial Court not only travels outside the record and evidence of this case, but admits unintroduced divorce affidavits by questioning the witness with it. But the Trial Court went even further by judicially noticing the factual theory the divorce court used in finding for the petitioner by stating "the purpose...was to frustrate creditors of the Madril family enterprises..." in the Trial Court's minute entry. Accordingly, a court may take notice of another court's order only for the limited purpose

of recognizing the "judicial fact" that the order represents or subject matter of the litigation. See *United States v. Garland*, 991 F.2d 328, 332 (6th Cir.1993) (citation omitted); *Colonial Leasing Co. v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir.1985); *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172-73 (10th Cir.1979). See also *ITT Rayonier, Inc. v. United States*, 651 F.2d 343, 345 n. 2 (5th Cir.1981) (court took notice of settlement in related proceeding rendering case at bar moot); *Moore v. Estelle*, 526 F.2d 690, 694, 696 (5th Cir.1976) cert. denied, 426 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1192 (1976) (court took notice of prior habeas judgment to identify issues already decided); *FDIC v. O'Flahaven*, 857 F.Supp. 154, 157-58 (D.N.H.1994) (court could not judicially notice veracity of allegation in affidavits from state court case; rather it could only take notice that the affidavits were filed and the averments were made).

CONCLUSION

The Trial Court's judicial notice of the divorce case, facts, exhibits, and theory are inconsistent with the decisions of this Court, the equal protection of the law and the due process requirements of the Fifth and Fourteenth

Amendments. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Francisco Madril, Jr.

_____

Pro Se Petitioner

App. 1

SUPREME COURT OF ARIZONA

ERNESTINE B. GALLEGO	)	Supreme Court
	)	No. CV-96-0111-PR
Plaintiff/Appellee,	)	
	)	Court of Appeals
	)	No. 2 CA-CV 95-0188
v.	)	
	)	Pima County
FRANCISCO MADRIL, JR.,	)	No. 286066
	)	
Defendant/Appellant.	)	
	)	

Defendant/Appellant Francisco Madril, Jr. has filed a "Motion for Permission to Request Reconsideration From the Supreme Court (Motion for Procedural Order)." The Court having considered the motion,

IT IS ORDERED that the Motion for Permission to Request Reconsideration is denied.

DATED this 16 day of July, 1996.

/s/ Frederick J. Martone
FREDERICK J. MARTONE
Duty Justice

To:
Richard Madril, Esq.
Charles P. Stirton, Esq.
Joyce Goldsmith, Clerk, Court Appeals, Division Two

App. 2

Supreme Court

STATE OF ARIZONA

June 16, 1996

RE:
ERNESTINE B. GALLEGO vs. FRANCISCO MADRIL, JR.
Supreme Court No. CV-96-0111-PR
Court of Appeals No. 2 CA-CV 95-0188
Pima County No. 286066

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 19, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 21st day of June, 1996.

NOEL K. DESSAINT, Clerk

TO:

Charles P. Stirton, Esq.
J. Thomas Poore, Esq., Poore & Riddle
Richard Madril, Esq.
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two
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App. 3

IN THE COURT OF APPEALS THE STATE OF ARIZONA

DIVISION TWO

ERNESTINE B. GALLEGO	No. CV-96-0111-PR
	No.2 CA-CV 95-0188
	Pima County No. 286066
Plaintiff/Appellee	
v.	MOTION FOR PERMISSION TO REQUEST RECONSIDERATION FROM THE SUPREME COURT (MOTION FOR PROCEDURAL ORDER)
FRANCISCO MADRIL, JR	
Defendant/Appellant	

Defendant/Appellant, Francisco Madril, Jr. by and through his attorney Richard Madril requests permission to request reconsideration from the Supreme Court for review of his petition with the Court.

The above referenced case is factually intensive and detail oriented. Unless careful analysis is made of the numerous dates and documents with their sequence in chronological order, one could easily be misled.

Appellant requests that two issues be examined by the Court for errors.

First, the Appellee's counsel's misstatements, exaggerations, and false characterizations of the facts to the Court of Appeals. Second, the error the Trial Court made by constructively and actually taking judicial notice of the Appellee's divorce file, which should have been reversible error.

Firstly, the Appellee's Statement of Facts to the Court of Appeals is riddled with several misstatements that are not in the record and are fabricated. For example, on page 15 of Appellee's Brief it is stated "Carlos testified that the Affidavit of Erroneous Recording was prepared and signed when he and Ernestine were separated and at about the same time he closed their joint bank account and changed the locks on the doors at the business. "No citation to the record is given Appellee's counsel and none can be found by Appellant other that Appellee saying the

locks at the business were changed.(1RT18/21).

Again, at page 5 of Appellee's Brief, it is stated "all the records of Carlos' and Ernestine's financial affairs prior to 1988 were solely in the possession of Carlos after their dissolution commenced in 1989." This statement is made to the Court in spite of Appellee's testimony at 1RT 63/12 in reference to her change of testimony at trial versus her deposition taken in July 1993. "And since I've been reviewing my records and I went over to the title company that closed the transaction, it turns out that that transaction was closed in '78 or '9. I can't recall. I have the document, I just-."

Further on page 5 of Appellee's Brief, Appellee's counsel conveniently omits reference to the single most important document of the case, the December 7, 1984 Deed of Trust which proves the existence of

the Appellee's debt which she claimed did not exist. Even the Court of Appeals was hoodwinked in failing to recognize or mention the importance of the December 7, 1984 note, which was not mentioned in their decision.

On page 8 of Appellee's Brief, Appellee's counsel indicates that "Despite these statements about other loans, Carlos could recall no other promissory notes except those three promissory notes in evidence." (TRII/83-1 to 4) But Appellee's counsel never asked Carlos that question in the trial, yet Appellee's counsel characterized Carlos' "fabricated" answer as a lie for failing to answer a question which was never asked of him.

In the argument to the Judicial Notice topic of Appellee's Brief at page 20 it is stated, "Appellant nowhere refers this Court to a part of the record on this appeal where the court took judicial notice of the

dissolution file or was requested to do so." The false characterization of the Appellant's position is proven wrong by the citations to the record which are contained in Appellant's Opening Brief at pages 16 and 17.

Further Appellee states a half truth at page 15 of the Answering Brief that "Appellant relies solely upon the testimony of Carlos and the Affidavit of Erroneous Recording, (EX-D), to support his contention that the obligation secured by the recorded Deed of Trust was not satisfied." But Appellee never mentions that Appellant also relied on the testimony of Richard Madril, (2RT 43), a licensed attorney in Arizona, regarding allegations made by Appellee as to her role in the Deed of Release and Reconveyance. (AP 7)[1].

Appellee consistently throughout the

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[1] References to the Opening Brief appendix will be made in the same manner as found therein.

trial and appeal has misled the jurist by providing misguided characterization of the testimony, information not in evidence, and misquotes of testimony by the witnesses. The win at any cost attitude is clearly demonstrated by the Appellee's counsel with his heavy handed tactics and false characterizations. The Court of Appeals cannot condone Appellee's counsel's behavior in providing misleading and false characterization of the facts to the court. This case could have been easily resolved if the facts were presented without the negative characterizations by Appellee's counsel.

Secondly, the Court of Appeals erred in failing to reverse the Trial Court's decision to take the divorce file into judicial notice. The Court of Appeals states "During the trial in this case, the court retrieved the divorce file and "leaf[ed]" through it." But the Trial

Court did a lot more that "leaf[ed]" through it. The Trial Court extensively reviewed and analyzed the divorce file to the point of asking direct and biased questions from the divorce material, after numerous, continuing and standing objections by Appellant's counsel.

Furthermore, the Trial Court asked questions regarding the divorce file's exhibits which were never submitted as evidence. Over Appellant's standing objection to the divorce files' exhibits and information, the Trial Court asks witness Gallego to confirm the exhibits and information by disclosing and showing them to her for the Trial Court's own satisfaction and confirmation.

The Trial Court demonstrates its intent of examining the divorce file by affirmatively requesting "Yes, He's going to have to come back. I want the divorce file and any exhibits that there may still be there next Tuesday

morning." In addition the Trial Court starts formulating preconceived ideas of questions by the stating "And I guess I've got a couple things on my mind, so I'm going to ask a few questions and then we'll break until Tuesday." (2RT 85/1-11).

Later in the trial the Trial Court demandingly states "I want the divorce file." (2RT 89/19-21) During the trial's proceedings the Trial Court forewarns the parties; he was following the proceedings with the divorce file by stating "I've got the file right here, counsel." (3RT 26/20-24)

Next the Trial Court abruptly notifies the parties that he wants more time to further peruse and analyze the divorce file in more depth by stating "I'm going to take a break for about 10 minutes. I'm trying to leaf through the divorce file." Afterwards the Trial Court asked knowledgeable questions

about the unsubmitted and objectionable divorce file evidence by stating "The last thing is an order for a civil arrest warrant, less than two weeks ago. Did counsel order that? (3RT 26/20-24).

Finally the Trial Court queried the witness Gallego directly from the unsubmitted and objectionable divorce file pleadings and exhibits by asking:

The Court: Let me ask a couple questions. Miss Gallego, in the divorce file one of the first pleadings filed was your estimate of your financial affidavit information. Let me show you what's here. You recognize whose writing that is?
The Witness: That's mine.
The Court: This seems to indicate real estate commissions in I assume three transactions in 1989 of $5,500 and $5,527?
The Witness: Yes
The Court: And tax and accounting income from February through October 10th 1989 altogether 50,561?
The Witness: Yes.
The Court: Those figures?
The Witness: That's what this is right here. That's how we arrived at our child support and spousal maintenance figures.
The Court: What was your job in the going business?
The Witness: I was office manager. I ran the

office, collected the money.
The Court: Bookkeeping and accounting service as well as a tax service?
The Witness: Yes.
The Court: Why aren't there better records of income and disbursements?
The Witness: Well, in '88 and '89 we did not have a checking account.
The Court: Why not?
The Witness: Because of the Mark Rogers lawsuit we couldn't have anything in our name, no real estate, no saving nor checking, no nothing.
The Court: How about earlier '81 and '82?
The Witness: We did have a Madril Tax and Accounting checkbook.
The Court: Again, where are the records that would indicated what was received and paid out to support all this evidence that I am hearing?
The Witness: Mr. Madril, Carlos Madril has those records.
The Court: That's all.

During the entire line of questioning by the Trial Court, Judge Carruth was reading the perusing the divorce file. The Trial Court purposely disclosed unsubmitted exhibits to the witness Gallego from the divorce file for the Trial Court's own confirmation of objectionable evidence over the standing objection by Appellant's counsel.

Previously Appellee alleged in her divorce from Carlos that the *Madril family enterprise[s]* conspired to frustrate their creditors, but never realleged the conspiracy theory in the present action; nor is the theory mentioned in the transcripts. Yet in the Trial Court's minute entry (AP11), the Trial Court conjurors up the conspiracy theory of *Madril family enterprise[s]* to frustrate their *creditors* from the only available source the *divorce* file. Then the Trial Court used the theory as a key justifications for its ruling, which reeks of judicial notice of the divorce file and its theories.

The courts have held "that the filing of a spousal affidavit with the clerk of the court in Maricopa County has no evidentiary value..." in *Kells v. Kells*, 183 Ariz.Adv.Rep. 21 (1995) In Kells, the court took judicial notice of the affidavit, but the appeals court

disagreed and noted that "the court could judicially notice only the procedural fact that the affidavit had been filed, not the truth of its assertion." *See Matter of Ronwin*, 139 Ariz. 576, 581, n.4, 680 P.2d 107, 112, n.4 cert. denied, 464 U.S. 977 (1983) ("We take notice that the cases exist, that allegations are made, etc. We cannot and do not take notice of the truth or falsity of specific allegations except as established by final judgment."); *State v. Lynch*, 115 Ariz. 19, 222, 562 P.2d 1386, 1389 (App.1977) proper to take judicial notice of procedural facts reflected in record, but not truth of testimony); Morris K. Udall et.al., *Arizona Practice: Law of Evidence* section 153 (3d ed. 1991). Kells, 183 Ariz.Adv.Rep. 21, 22 (1995).

Here the divorce file was never offered as evidence and Judge Carruth took actual and constructive judicial notice of the civil

arrest warrant, pleadings, financial affidavits, and various other items by using the Appellee's divorce case theory of a conspiracy by the *Madril family enterprise[s]* to frustrate their *creditors* in the Trial Court's minute entry. The Court of Appeals must further note that Carlos advised Judge Carruth that he did not have a lawyer in the divorce proceeding, which means Carlos probably did not object to any evidentiary problems in the divorce proceedings. (2RT 67-2-10) As the key justification used in the Trial Court's decision Judge Carruth demonstrated his bias toward Appellant by finding against him on a conspiracy by the *Madril family enterprise[s]* to frustrate their *creditors*, a theory never mentioned at trial but used only in the previous divorce trial. Appellant's case was not decided on its merits, but the biased and unchallenged evidence in the divorce file.

Therefore the Appellant asks for permission to ask the Supreme Court for reconsideration on the Trial Court's error which was a violation of Appellant's "due process" rights to a fair and non-prejudice trial.

RESPECTFULLY SUBMITTED this 10th day of July, 1996.

/s/ Richard Madril
RICHARD MADRIL
Attorney of Defendant/Appellant

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERNESTINE B. GALLEGO,
Plaintiff/Appellee,

v.

FRANCISCO MADRIL,JR.
Defendant/Appellant.

2 CA-CV 95-0188

Department A

MEMORANDUM DECISION
Not for Publication Rule 28(a)(2) Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 286066

Honorable James C. Carruth, Judge

AFFIRMED

Poore & Riddle By: J. Thomas Poore Tucson
Attorneys for Defendant/Appellant

Charles P. Stirton Tucson
Attorney for Plaintiff/Appellee

PELANDER, Judge.

Defendant/appellant Francisco, Jr. (defendant) appeals from an adverse judgment entered in favor of his former sister-in-law, plaintiff/appellee Ernestine Gallego after a bench trial. He raises numerous errors, none of which merits reversal.

Viewed in a light most favorable to plaintiff, *Paul Schoonover, Inc. v. Ram Constr., Inc.*, 129 Ariz. 204, 205, 630 P.2d 27, 28 (1981), the facts are as follows. Plaintiff and defendant's brother, Carlos Madril, were married from 1965 until their divorce in October 1991. They resided at 3031

W. Holladay (the property) in Tucson. In September 1981, Carlos' parents, Francisco Sr. (Frank) and Carlota Madril, loaned Carlos approximately $5,800.[1] Carlos executed a promissory note dated September 15, 1981 in the amount of $5,700, payable to his parents at the rate of eighteen percent per annum on November 15 of an unspecified year. Carlos also executed, but did not record, a deed of trust on the property, designating his parents as as beneficiaries. Carlos told plaintiff, who signed neither the note nor deed of trust, that he planned to pay back the loan immediately.

Carlos prepared a second promissory note (note 2) in the amount of $5,857.16, representing the exact amount loaned by and owned to his parents. That note was dated September

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[1] Carlos' parents, Frank and Carlota Madril, died in 1990 and 1986 respectively.

15, 1981, and called for one balloon payment, including interest at the rate of eighteen percent per annum compounded monthly, on September 15, 1981. Note 2 was payable to Frank Sr. and defendant. Carlos testified that he executed that note in September 1981 and gave it to his father, who later gave it to defendant. Plaintiff testified, however, that she signed that note in July 1986 at Carlos' urging, after he created it for the fraudulent purpose of avoiding a June 1986 judgment that his former employee had obtained against plaintiff and him. Carlos also prepared a deed of trust on the property (deed 2), securing the note debt and naming Frank, Sr. and defendant as beneficiaries. That deed, though dated September 1981, was actually executed by plaintiff and Carlos and recorded on July 17, 1986. In September 1991, defendant demanded from plaintiff almost $34,000, the total

principal and accrued interest claimed to be due and owing on note 2[2]. When plaintiff refused to pay, defendant initiated foreclosure proceeding on deed 2. Plaintiff then filed this declaratory relief action under A.R.S. section 12-0831 et seq., alleging that note 2 was void for lack of consideration and that deed was void because the alleged indebtedness which it secured did not exist. After a two-day bench trial, the trial court issued the following minute entry:

> Having now considered this matter, the Court is satisfied that Plaintiff is entitled to Judgment quieting her title to the subject property as against the Deed of Trust set up by defendants. While it is clear that plaintiff's then father-in-law did loan money to plaintiff and her then husband in the fall of 1981, it is also clear that that loan had been repaid in full well before the Deed of Trust dated July 17, 1986.
>
> THE COURT FINDS that there was no real

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[2] Defendant never loaned any money to Carlos or plaintiff, but merely retained the entire beneficial interest in note 2 and deed 2 after his father died.

consideration for the Promissory Note [note 2] claimed by defendants to be secured by the Deed of Trust, and that the purpose for the execution of the various documents in question was to frustrate *creditors* of the *Madril family enterprises*.

IT IS ORDERED that Judgment be entered for Plaintiff that the Deed of Trust [deed 2] dated July 17, 1986 and describing the subject property is declared to be null and void and of no legal effect as an encumbrance upon the plaintiff's title to that property. Plaintiff is also to have Judgment for reasonable attorney's fees and taxable costs..

Pursuant to those findings, the trial court entered judgment for plaintiff and awarded her $20,000 of the $28,231.50 in attorney's fees she requested under A.R.S. section 12-341.01. This appeal followed.

Defendant first contends that the evidence was insufficient to support the trial court's findings that there was no consideration to support note 2, and that the 1981 loan was repaid in full before deed was executed and recorded in July 1986. We disagree. We view the evidence and reasonable inferences

therefrom in the light most favorable to the party in whose favor the judgment was rendered and if there is any evidence to support the judgment of the trial court, it must be affirmed." *Paul Schoonover, Inc.* 129 Ariz. at 205, 630 P.2d at 28.

Plaintiff testified that Carlos told her during the 1982 tax season that he had repaid the 1981 loan with money earned during that time frame from their tax and accounting business. She further testified that during that time she saw checks made out to Frank, Sr. in amounts"[a]nywhere from $50 to $300, $400." Plaintiff further stated that she and Carlos executed note 2 and deed 2 in July 1986 solely to avoid a judgment against them. There also was evidence that Frank, Sr. executed a Deed of Release and Reconveyance in October 1989, which was recorded at that time.

Defendant acknowledges that "this case

turns solely on the facts and who is to be believed regarding these facts" and that "the credibility of the witnesses is a matter for the trial court to assess" We agree, and on that basis reject his contention regarding sufficiency of the evidence. We will not interfere with the trial court's judgment based upon conflicting evidence. *Curtis v. Tromble*, 155 Ariz. 429, 430, 747 P.2d 590, 591 (App. 1987). Although conflicting, the evidence here was sufficient to support the trial court's findings and judgment.

Defendant next contends that the trial court abused its discretion by taking judicial notice of the court's separate file relating to Carlos and plaintiff's divorce. During the trial in this case, the court retrieved the divorce file and "leaf[ed]" through it. The trial court asked plaintiff's counsel if he had ordered a recent civil arrest warrant

contained in the divorce file, and counsel replied that he had. The court also used a financial affidavit filed in the divorce action to confirm plaintiff's testimony concerning income earned during 1989.

There is no indication that the trial court took judicial notice of the divorce file or was requested to do so, and the court's limited reference to it, even if erroneous, is not grounds for reversal. A trial court may take judicial notice of procedural facts contained in the record of another superior court action. *State v. Lynch*, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 App. 1977). The court was entitled to notice the civil arrest warrant and dissolution decree as procedural facts in the divorce case. Even if the court's reference to the financial affidavit was improper, see *Scottsdale Mem. Health Sys. v. Clark*, 157 Ariz. 461, 468 759 P.2d 607, 614

(1988), that was not the only evidence of the Madril business earnings in 1989. Plaintiff testified about those earnings, and the trial court could have believed her testimony alone without relying upon the affidavit. Defendant's speculative contention that "[i]t is highly likely that matters that occurred and were contained in the divorce were considered by the Court" is insufficient to establish any abuse of discretion or other reversible error.

Defendant also contends that the trial court erred in admitting plaintiff's testimony about statements allegedly made by Carlota and Frank, Sr., because they were inadmissible hearsay. Specifically, plaintiff testified that Carlota had said that Carlos paid back the loan, and also testified about a phone conversation in which Frank, Sr. said "okay" after she told him that she had recorded the

Deed of Release and Reconveyance because the loan had been paid. Defendant further contends that evidence relating to the Madril family corporation and to Carlos and plaintiff's divorce was irrelevant and therefore improperly admitted.

In civil cases tried to a judge without a jury, we presume "that if improper evidence was admitted, the court ignored it and considered only the admissible evidence, "that if improper evidence was admitted, the court ignored it and considered only the admissible evidence, [and i]f the addmissible evidence is sufficient to support the juegment, it will be sustained regardless or error." *Parkinson v. Farmers Ins. Co.*, 122 Ariz. 343, 345, 549 P.2d 1039, 1041 (App. 1979). Assuming without deciding that any of the foregoing evidence was inadmissible, the trial court's judgment still is supported by sufficient, competent

evidence; and therefore we affirm regardless of any alleged eror in admitting other evidence. See *American Eagle Fire Ins. Co. v. Van Denburgh*, 76 Ariz. 1, 6, P.2d 856, 859 (1953).

Finally, although defendant requested an award of attorney's fees in the trial court and also requests fees on this appeal, he contends that the trial court abused its discretion in awarding fees to plaintiff. We will not disturb an award of attorney's fees absent an abuse of discretion, and will affirm the award if there is a reasonable basis in the record supporting it. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570-71, 694 P.2d 1181, 1184-85 (1985). Considering the relevant factors outlined in Warner, the trial court had a sufficient basis for awarding fees to plaintiff in this case. She prevailed on all of her claims in this action. The record

indicates that the litigation could have been avoided or settled. In addition, defendant has made no showing that he would suffer extreme hardship if forced to pay the attorney's fee award.

Defendant also contends that plaintiff should not have been awarded fees because she conspired with Carlos to create and record fraudulent instruments in violation of A.R.S. section 39-161. We reject that contention for two reasons. First, because it was not raised in the trial court, we need not consider it. Richter v. Dairy Queen of S. Ariz., Inc. 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982). Second, although plaintiff admittedly was told by Carlos that note 2 and deed 2 were fraudulently prepared in order to avoid a judgment against them, the trial court was in the best position to determine whether plaintiff's knowledge of or complicity in any fraud was

such that it should bar an attorney's fees award. We cannot say the trial court abused abused its discretion in awarding her fees.

The trial court's judgment is affirmed. In our discretion we deny both parties' requests for attorney's fees incurred on appeal.

\s\ John Pelander
JOHN PELANDER, Judge

CONCURRING:

\s\ Joseph M. Livermore
Joseph M. Livermore, Presiding Judge
\s\ Lloyd Fernandez
LLOYD FERNANDEZ, Judge

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERNESTINE B. GALLEGO,	)	2 CA-CV 95-0188
	)	Department A
Plaintiff/Appellee,	)	
	)	Pima County
v.	)	Cause No. 286066
	)	
FRANCISCO MADRIL, JR.,	)	O R D E R
	)	
Defendant/Appellant.	)	

The above-entitled matter was duly

submitted to the Court. The court has this day rendered its MEMORANDUM DECISION.

ORDERED: The MEMORANDUM DECISION be filed.

FURTHER ORDERED: A copy of this order together with a copy of the MEMORANDUM DECISION be sent to each party appearing herein or the attorney for such party and to the Hon. James C. Carruth, Judge.

Dated: December 26, 1995

/s/ Joyce A. Goldsmith
Clerk of the Court

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: HON. JAMES C. CARRUTH CASE NO. 286066
Court Reporter: NONE DATE March 8, 1995

ERNESTINE B. GALLEGO

vs.

FRANCISCO MADRIL, JR.

EVENT SUMMARY

Type: Result:
Date: Time: Length: Div. Req:

M I N U T E E N T R Y

COURT TRIAL UNDER ADVISEMENT:

Having now considered this matter, the Court is satisfied that Plaintiff is entitled

to Judgment quieting her title to the subject property as against the Deed of Trust set up by Defendants. While is also clear that that loan had been repaid in full well before the Deed of Trust dated July 17, 1986.

THE COURT FINDS that there was no real consideration for the Promissory Note claimed by defendants to be secured by the Deed of Trust, and that the purpose for the execution of the various documents in question was to frustrate creditors of the Madril family enterprises.

C. Ouiles
Deputy Clerk

MINUTE ENTRY

PAGE NO. 2 Date March 8, 1995 Case No. 286066

IT IS ORDERED that Judgment be entered for Plaintiff that the Deed of Trust dated July 17, 1986 and describing the subject property is declared to be null and void and

of no legal effect as an encumbrance upon the Plaintiff's title to that property. Plaintiff is also to have Judgment for reasonable attorney's fees and taxable costs. Mr. Stirton is to prepare an appropriate form of Judgment and the necessary affidavit concerning fees and costs.

cc: Hon. James C. Carruth
Charles P. Stirton, Esq.
J. Thomas Poore, Esq. (POORE & RIDDLE)
Court Administrator
U/A Clerk

C. Quiles
Deputy Clerk